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NO. 20552

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ISLAND AIRLINES, INCORPORATED,)

Petitioner,)

vs.)

CIVIL AERONAUTICS BOARD,)

Respondent.)

PETITION TO REVIEW
ORDER OF THE CIVIL
AERONAUTICS BOARD

BRIEF OF AMICUS CURIAE
HAWAIIAN AIRLINES, INC.

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BRIEF OF AMICUS CURIAE
HAWAIIAN AIRLINES, INC.

SUMMARY OF ARGUMENT

A. The decision of this Court in the injunction proceeding, which is related to this proceeding, Island Airlines v. C.A.B., 352 F.2d 735 (9th Cir. 1965), has already rejected Island Airlines' contention in its second specification of error that -

Denial of exemption was unlawful because it extinguished Hawaii's power over its intra-state commerce in derogation of Hawaii's "equal

footing" with other states under the U.S. Constitution and the Hawaii Statehood Act. (p. 4, Petitioner's Brief)

B. The continued policing by the Civil Aeronautics Board which is required in California to prevent an intrastate airline from carrying interstate passengers (persons whose journeys commenced or terminated at points outside of California) is adequate reason for the Board's denial of exemption of a proposed operation which could create the same problems.

ARGUMENT

I. DENIAL OF EXEMPTION DOES NOT DEPRIVE THE STATE OF HAWAII OF "EQUAL FOOTING" IN THE FEDERAL UNION.

The decision of this Court in the injunction proceeding, which is related to this proceeding, Island Airlines v. C.A.B., 352 F.2d 735 (9th Cir. 1965), has already rejected Island Airlines' contention in its second specification of error that -

Denial of exemption was unlawful because it extinguished Hawaii's power over its intrastate commerce in derogation of Hawaii's "equal

footing" with other states under the U.S. Constitution and the Hawaii Statehood Act. (p. 4 Petitioner's Brief)

In that decision (352 F.2d 735 at p. 744), this Court stated:

We find no "invidious discrimination" against the State of Hawaii in the court's decision below. "Equal boundaries to each state are not necessary." United States v. Louisiana, 363 U.S. 1, 77 (1960).

This Court's decision in the injunction proceeding used the phrase "invidious discrimination" rather than "equal footing," but they were undoubtedly synonymous in the Court's mind. The case cited by the Court, United States v. Louisiana, supra, does not use the phrase "invidious discrimination," but does use the phrase "equal footing" at the cited page. However, the phrase "invidious discrimination" was used by Island Airlines in its brief in the injunction proceeding dated December 24, 1964, on page 3 in the statement of points to be relied upon on appeal, which states as follows:

The Court below erred in not holding that appellee's construction and application of the Federal Aviation Act resulted in unconstitutional and invidious discrimination against Hawaii, her people and appellant.

In the same brief (pp. 92-95), Island specifies as error -

The invidious discrimination against Hawaii and its people by appellee makes its application and construction thereof unconstitutional.

In this specification of error, Island cites one case in support of the invidious discrimination argument, Coyle v. Oklahoma, 221 U.S. 559 (1911). Coyle, however, nowhere mentions "invidious discrimination," but does discuss "equal footing."

From an examination of the briefs on both sides and the Court's opinion in the injunction proceeding, it is clear that the Court did, as the Civil Aeronautics Board contends, reject the equal-footing argument as it applies to this case:

1. Island's brief talks in terms of "invidious discrimination," but in support thereof cites the case Coyle v. Oklahoma, supra, which discusses equal footing.

2. The Civil Aeronautics Board brief talks in terms of "equal footing" and cites, among other cases,

United States v. Louisiana, supra, which also talks in terms of "equal footing."

3. The Court in the injunction proceeding ruled that there was no "invidious discrimination" against the State of Hawaii, but the case it cited in support thereof, United States v. Louisiana, supra, talks only in terms of "equal footing."

In view of the foregoing, it is obvious that although the Court in the injunction proceeding decision spoke of invidious discrimination, it was in fact disposing of the equal footing argument advanced by Island Airlines in that proceeding.

The United States Court of Appeals for the Ninth Circuit was correct in rejecting Island's equal-footing argument because that doctrine has never required that the various states be treated equally in every respect. For example, United States v. Louisiana, supra, cited by both the Civil Aeronautics Board and the Court, provides as follows:

. . . Nor does the concept of equal footing require such a construction. While the ownership

of certain lands within state boundaries has been held to be an inseparable attribute of the political sovereignty guaranteed equally to all States, see United States v Texas, supra (339 US at 716), the geographic extent of those boundaries, and thus of the lands owned, clearly has nothing to do with political equality. (p. 77)

Another Supreme Court case discussing equal footing is Alabama v. Texas, 347 U.S. 272 (1954). That case provides as follows:

The fact that Alabama and the defendant states were admitted into the Union "upon the same footing with the original states, in all respects whatever," 2 Stat 701, 3 Stat 489, 5 Stat 742, 797, 9 Stat 452, does not affect Congress' power to dispose of federal property. The requirement of equal footing does not demand that courts wipe out diversities "in the economic aspects of the several States," but calls for "parity as respects political standing and sovereignty." United States v. Texas, supra (339 US at 716). The power of Congress to cede property to one state without corresponding cession to all states has been consistently recognized. See, e.g., United States v. Wyoming, 335 US 895, 93 L ed 431, 69 S Ct 297, and cases cited by the Court. (p. 275)

Another case discussing equal footing is United States v. Texas, 339 U.S. 707 (1950). A portion of the Court's opinion follows:

. . . We are of the view that the "equal footing" clause of the Joint Resolution admitting Texas to the Union disposes of the present phase of the controversy.

The "equal footing" clause has long been held to refer to political rights and to sovereignty. See *Stearns v. Minnesota*, 179 US 223, 245, 45 L ed 162, 174, 21 S Ct 73. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders. See *Stearns v. Minnesota*, supra (179 US pp 243-245, 45 L ed 173-175, 21 S Ct 73). Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.

Yet the "equal footing" clause has long been held to have a direct effect on certain property rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States, but reserved them to themselves. . . . (pp. 715-716)

Federal regulation that is otherwise valid is not

a violation of the "equal-footing" doctrine merely because its impact may differ between various states because of geographic or economic reasons. United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876).

II. THE CONTINUED POLICING WHICH EXEMPTION WOULD REQUIRE IS ADEQUATE REASON FOR DENIAL OF EXEMPTION.

The continued policing by the Civil Aeronautics Board which is required in California to prevent an intra-state airline from carrying interstate passengers (persons whose journeys commenced or terminated at points outside of California) is adequate reason for the Board's denial of exemption of a proposed operation which could create the same problems.

In California there are airlines which operate without a Civil Aeronautics Board certificate of public convenience and necessity because they fly only within the boundaries of the state, and they have represented that they do not carry substantial numbers of interstate passengers. C.A.B. v. Friedkin Aeronautics, 246 F.2d 173 (9th Cir. 1957). On this basis, they are beyond the reach of the Board's

economic regulation. Where the geographic factor is lacking, similar carriage in California has been subjected to the Board's economic regulation. United Airlines, Inc. v. P.U.C., 109 F.Supp. 13 (N.D.Cal. 1952), rev'd on other grounds, 346 U.S. 402 (1953).

Respondent's brief in this proceeding, in footnote 23 on page 22, points out that a cease and desist order has been issued against the carrier involved in the Friedkin case, supra.

The situation in Hawaii is similar in that substantial numbers of tourists and other interstate passengers fly between the Hawaiian Islands and a similar policing problem would be bound to develop if the exemption requested by petitioner were to be granted.

CONCLUSION

The declared policy underlying the Federal Aviation Act of 1958, which is set forth in Section 102, 49 U.S.C. 1302, contemplates a national air transportation system regulated by the Civil Aeronautics Board. The juris-

dictional sections of the Act are designed to extend the jurisdiction of the Board to the utmost within the limits of the Commerce Clause of the United States Constitution. In California the Board has been thwarted by the geographical factor in extending its economic regulation to certain airlines and has been forced into the role of a policeman attempting to prevent the "intrastate" airlines from carrying interstate passengers. The State of Hawaii has a geographical situation which precludes such a limitation on the Board's jurisdiction and thereby furthers the policy of the Federal Aviation Act.

DATED: Honolulu, Hawaii, April 11, 1966.

Respectfully submitted,

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